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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 311

CHARLES D. OFFHOUSE, ET ALS.,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON IN THE COUNTY OF PASSAIC, A CORPORATION,
Appellee.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF JURISDICTION.

The appellants contend that the basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the New Jersey Supreme Court in this case is as follows:

I.

The statutory provisions sustaining the jurisdiction are found in the Act of February 13, 1925, Chapter 229, 43 Stat. 936 (Title 28, U. S. Code, Section 344(a)), providing that

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, • • • where is drawn in question the validity

> of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

and in the Act of January 31, 1928, Chapter 14, 45 Stat. 54 (Title 28, U. S. Code, Section 861(a)), abolishing the writ of error and substituting appeal therefor; and in the Act of April 26, 1928, Chapter 440, 45 Stat. 466 (Title 28, U. S. Code, Section 861(b)), providing that the statutes governing writs of error shall be applicable to appeals.

II.

The law, the validity of which is involved in this cause, is a resolution adopted by the appellee, a municipal corporation of New Jersey, on October 14, 1937, which reads as follows:

> "Resolved, that all resolutions heretofore adopted and approved by the Board of Education, providing for a reduction in the basic salary of the officers and employees of the Board of Education be rescinded as of October 1, 1937, and be it further
>
> Resolved, that on and after October 1, 1937, all officers and employees be paid the base salary in accordance with the terms of their employment, providing the aforesaid officers and employees waive all claims, demands, damages or liabilities, which they have had or now have for or on account of any and all reductions made or affected prior to said October 1, 1937."[1]

III.

The date of the final judgment of the New Jersey Supreme Court sought to be reviewed herein is May 6, 1944.

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[1] This resolution has no official reference. It appears in the regular minutes of a meeting of the appellee. It is part of the Record below (Page 63).

This application for appeal is herewith presented on July 3, 1944.

IV.

The appellants are tenure teachers, principals, and supervisors employed by the appellee, which, under New Jersey law, is a municipal corporation. R. S. 18:6-21; *Merrey* v. *Board of Education,* 100 N. J. L. 273. In New Jersey, teachers who have been continuously employed for at least three years in a particular school district, acquire tenure, which protects them from dismissal without cause, and against reduction in salary. P. L. 1909, Ch. 243; R. S. 18:13-16, 18:13-17 (See post, Appendix A). The relationship between teacher and employer in New Jersey must be evidenced by written contracts in triplicate with individual teachers, or, in the absence of such written contracts, by rules and regulations adopted by the employing board of education, the rules and regulations being substitutes for written contracts. P. L. 1903, Second Special Session, Ch. 1 §106, R. S. 18:13-5, 18:13-7 (See post, Appendix B); *Weber* v. *Board of Education,* 127 N. J. L. 279, 286; *Redcay* v. *State Board of Education,* 130 N. J. L. 369, 371; affirmed, 131 N. J. L. 326.

On October 13, 1921, the appellee adopted rules and regulations, which it amended on July 14, 1927. The adoption of the rules and regulations was in pursuance of the statutory authority conferred by P. L. 1903, Second Special Session, Ch. 1, §106 (See post, Appendix B).

The rules and regulations so adopted and amended contained a schedule of salaries which separated the teaching staff into categories determined by the nature of the duties to be performed, the grade taught, and prior education and preparation. For each category, there was provided a stated minimum salary, and a stated maximum salary. The progression from minimum to maximum salary was accom-

plished in annual stages. The rules and regulations appear on pages 38 to 45 of the record below. In respect to teachers' salaries, the rules and regulations adopted October 13, 1921, and amended July 14, 1927, provided in part:

"GENERAL STATEMENT OF APPLICATION OF THE NEW SALARY SCHEDULE.

All teachers including principals and supervisors will be placed on the new salary schedule this year at the salary now paid for this school year and will be advanced on the new salary schedule next year and thereafter at the rate of increase as provided in the new salary schedule. In case the salary now paid is less than the minimum salary provided in the new salary schedule, the salary paid next year may remain less than this minimum but will be as much greater than the salary paid this year as the rates of increase provide in the new salary schedules for the particular positions."

• • • • • • •

"Teachers in Elementary Grades

License No. 1 or Temporary Certificate

1st year	$1200	3rd year	$1400
2nd "	1300		

License No. 1 granted upon appointment as teacher. Candidates must be graduates of a normal school of a standard two year course.

License No. 2 or Permanent Certificate

4th year	$1500	7th year	$1800
5th "	1600	8th "	1900
6th "	1700		

License No. 2 granted after three years satisfactory service as a teacher.

License No. 3 or Professional Certificate

9th year	$2100	12th year	$2700
10th "	2300	13th "	2800"
11th "	2500		

• • • • • • •

"High School Teachers (Men and Women)

1st year	$2000	7th year	$3200
2nd "	2200	8th "	3400
3rd "	2400	9th "	3600
4th "	2600	10th "	3800
5th "	2800	11th "	4000
6th "	3000	12th "	4200

Heads of departments in high school shall receive $400 in addition to the regular schedule of salaries for high school teachers."

There are similar provisions for other categories, such as supervisors, principals, manual training teachers, and teachers of other special classes.

From 1921 to 1932, the appellee paid its teacher employees in the manner and in the amounts provided by the rules and regulations. In 1932, it departed from the rules and regulations, and paid its teacher employees reduced salaries. From July 1, 1933, to July 1, 1937, there was in effect in New Jersey, a series of emergency statutes permitting local boards of education to reduce the salaries of teachers under tenure. The constitutionality of one of these statutes was upheld in *Phelps* v. *Board of Education*, 300 U. S. 319. The statutes in question are P. L. 1933, Ch. 12, Ch. 449; P. L. 1935, Ch. 6; P. L. 1936, Ch. 7, Ch. 27. On the expiration of these statutes on July 1, 1937, local boards were without power to continue to pay teachers at reduced rates. *Steck* v. *Camden Board of Education*, 123 N. J. L. 158; affirmed, 124 N. J. L. 132.

The appellants made demand upon the appellee, after July 1, 1937, for resumption of salaries in the amounts provided for in the rules and regulations. They made and make no demand for any salaries alleged to have accrued to them prior to July 1, 1937, the date upon which the emergency statutes above referred to, expired. The appellee refused to comply with the demand of the appellants, relying upon the resolution of October 14, 1937, supra, repealing the rules and regulations.

Section 18:3-14 of the Revised Statutes of New Jersey provides that the Commissioner of Education shall decide all controversies and disputes arising under the school laws of the state. Sections 18:2-4(d) and 18:3-15 of the Revised Statutes provide that the State Board of Education shall decide appeals from the decisions of the Commissioner of Education. These provisions have been construed as prohibiting recourse to the courts until the statutory tribunals have ruled on the controversy. *Ridgway* v. *Board of Education,* 88 N. J. L. 530; *Stockton* v. *Board of Education,* 72 N. J. L. 80; *Board of Education* v. *State Board of Education,* 115 N. J. L. 364.

The appellants, pursuant to R. S. 18:3-14, filed a petition with the Commissioner of Education alleging, among other things, that they were employed as teachers or principals by the appellee; that each had tenure as defined by P. L. 1909, Ch. 243, now sections 18:13-16 and 18:13-17 of the Revised Statutes (See post, Appendix A), that, pursuant to the provisions of P. L. 1903, Second Special Session, Chapter 1, § 106 (See post, Appendix B), the appellee had adopted rules and regulations governing the engagement and employment of teachers and principals, their salaries and the time and mode of payment thereof; that the appellee had failed and refused to pay the appellants the salaries in the manner and in the amounts provided for in the rules and regulations so adopted. They prayed that the appel-

lee be directed to pay them at the rates and in the manner provided by the rules and regulations. The specific grievance which they asked the Commissioner to rectify, was the act of the appellee in freezing the salaries of the appellants at the 1932 levels without paying them the increased annual compensation promised them by their contract. The Commissioner of Education held that the appellee had repealed the rules and regulations, and dismissed the appellants' petition.

The appellants appealed to the State Board of Education. Their grounds of appeal were based, in part, on their constitutional right to be protected against the repeal of the rules and regulations adopted by the appellee, asserting that the adoption of the rules and regulations by the appellee constituted a contract between the appellants and the appellee, and that the repeal, rescission, or revocation of the rules and regulations so adopted violated Article 1, Section 10 of the United States Constitution (R. 77 and 78).

The State Board of Education affirmed the decision of the Commissioner of Education, holding, consistently with its own prior rulings, that it had no power to pass upon the constitutional issue raised. Its opinion stated that it

> "will not decide constitutional questions, when any doubt exists, deferring in that respect to the superior courts of law" (R. 87).

In New Jersey, the decisions of administrative agencies such as the State Board of Education are reviewable, in the absence of a controlling statute, by the New Jersey Supreme Court, on a writ of certiorari, a prerogative writ which issues not as a matter of right, but as a matter of grace. *Board of Education, Flemington* v. *State Board of Education,* 81 N. J. L. 211; affirmed, 85 N. J. L. 384. The appellants applied to the New Jersey Supreme Court for a writ to review the decision of the State Board of Educa-

tion. One of the grounds upon which the application for the writ was based, was that the adoption of rules and regulations by the appellee created a contract with the appellants, and that the resolution repealing these rules and regulations violated the provisions of Article 1, Section 10 of the United States Constitution. The New Jersey Supreme Court dismissed the appellant's application for the writ. In a written opinion, a copy of which is hereto appended (See post, Appendix C), that court held that the repeal of the rules and regulations did not violate Article 1, Section 10 of the United States Constitution. The opinion of the New Jersey Supreme Court is reported in *Offhouse* v. *State Board of Education*, 131 N. J. L. 391. The federal question was raised in the first New Jersey tribunal which had jurisdiction to decide it. It was argued before the New Jersey Supreme Court, and was decided by that court adversely to the claim of the appellants. The ruling of the New Jersey Supreme Court on the federal question so raised, was necessary to the decision rendered in the cause, and was dispositive thereof.

The rule of the New Jersey Supreme Court dismissing the appellants' application for a writ to review the determination of the State Board of Education, is not appealable. *Post* v. *Anderson*, 111 N. J. L. 303; *Staubach* v. *Cities Service Oil Co.*, 130 N. J. L. 157.

V.

The decisions which sustain the jurisdiction of the Supreme Court of the United States to review this cause on appeal are:

(a) Cases which hold that a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political sub-division of the State, that it may properly

be considered as a law within the meaning of Article 1, Section 10 of the Constitution, are:

Atlantic Coast Line R. Co. v. *Goldsboro,* 232 U. S. 548;
Cuyahoga River Power Co. v. *Akron,* 240 U. S. 462;
King Manufacturing Co. v. *Augusta,* 277 U. S. 100.

(b) Where the State has authorized an agency to enter into a contract, and that agency does enter into an authorized contract, it is bound by its contract to the same extent and in the same manner as an individual is bound:

Hall v. *Wisconsin,* 103 U. S. 5.

(c) Cases which hold that, where the Supreme Court of the United States is asked to invalidate a state law upon the ground that it impairs the obligation of a contract, the existence of the contract, and the nature and extent of its obligation become federal questions for the purpose of determining whether they are within the scope and meaning of the Federal Constitution, and for such purpose finality cannot be accorded to the views of a state court, are:

Indiana Ex Rel Anderson v. *Brand,* 303 U. S. 95;
Irving Trust Co. v. *Day,* 314 U. S. 556.

VI.

The question involved in this case is substantial. The relationship between the appellants and the appellee is contractual. *Gowdy* v. *State Board of Education,* 84 N. J. L. 231; affirmed 85 N. J. L. 726; *Weber* v. *Board of Education, supra.* The *Gowdy* case held that the provisions of Chapter 1, P. L. 1903, Second Special Session (See post, Appendix B), permitting the amendment of rules and regulations, were curtailed and circumscribed by the enactment of P. L. 1909, Ch. 243 (post, Appendix A); that the two acts must be read together, and that any change in rules and regulations

detrimental to a teacher under tenure is an impairment of contract. This decision has stood since 1913. It was reaffirmed in 1941, by the New Jersey Supreme Court in *Board of Education, Trenton* v. *State Board of Education,* 125 N. J. L. 611, at page 614; and by the New Jersey Court of Errors and Appeals in 1941, in *Weber* v. *Board of Education, supra,* affirming *Board of Education, Trenton,* v. *State Board of Education, supra.*

The New Jersey Supreme Court in this case gave effect to a resolution of the appellee repealing the rules and regulations embodying the contract between the appellants and the appellee, against the claim of the appellants that such repealer impaired the obligation of their contract contrary to Article 1, Section 10 of the United States Constitution. Under these circumstances, a substantial federal question is presented. *New York Electric Lines Co.* v. *Empire City Subway Co.,* 235 U. S. 179; *Indiana Ex Rel Anderson* v. *Brand,* 303 U. S. 95.

Phelps v. *Board of Education, supra,* relied upon in the opinion of the New Jersey Supreme Court, is not determinative of the issue presented by this case. The *Phelps* case held only that the New Jersey tenure law (post, Appendix A), in and of itself, did not create a contract. It affirmed the power of the state legislature to enact a statute enabling local boards of education to cut tenure teachers' salaries, where the claim of contract by the teachers was based solely on the tenure law. In addition, the enabling law in issue in the *Phelps* case is no longer in force, having expired on July 1, 1937 (P. L. 1936, Chapter 27). There is now no comparable statute in New Jersey, the situation now being the same as if that law "never had existed". *Steck* v. *Board of Education,* 123 N. J. L. 158; affirmed, 124 N. J. L. 132.

The *Phelps* case did not involve or discuss the right of a local board of education to affect tenure teachers' salaries

in the absence of legislation authorizing it to do so. The statute (post, Appendix B) pursuant to which the appellee contracted with the appellants, was not in issue in the *Phelps* case. In the *Phelps* case, the absence of anything in the record to establish a contract for more than one year, was noted by this Court. In this case, the record discloses evidence of a contract which was in fact adhered to and performed according to its terms for twelve years, from 1921 to 1932.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the New Jersey Supreme Court in this cause.

JEROME C. EISENBERG,
Attorney for Appellants.

APPENDIX "A".

Chapter 243, P. L. 1909, Section 1.

"The service of all teachers, principals, supervising principals of the public schools in any school district of this State, shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; provided, that the time any teacher, principal, supervising principal, has taught in the district in which he or she is employed at the time this act shall go into effect, shall be counted in determining such period of employment. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not."

APPENDIX "B".

Section 106, Chapter 1, P. L. 1903, Second Special Session.

"A board of education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment, and the promotion and dismissal of such teachers and principals, the salaries, and the time and mode of payment thereof, and may from time to time change, amend or repeal such rules and regulations. The employment of any teacher by such board, and the rights and duties of such teacher with respect to such employment, shall be dependent upon and shall be

governed by the rules and regulations in force with reference thereto. If a Board of education shall not have made rules and regulations as aforesaid then no contract between such board of education and a teacher shall be valid unless the same be in writing, or partly written and partly printed, in triplicate, signed by the president and district clerk or secretary of the board of education and by the teacher. One copy thereof shall be filed with the board of education, one copy with the teacher and one copy with the county or city superintendent. Such contract shall specify the date when such teacher shall begin teaching, the kind and grade of certificate held by said teacher and the date when said certificate will expire, the salary, and such other matter as may be necessary to a full and complete understanding of the same. In every such contract, unless otherwise specified, a month shall be construed and taken to be twenty school days or four weeks of five school days each. The salary specified in every such contract shall be paid in equal monthly installments, not later than five days after the close of each month while the school shall be in session. Any contract or engagement between a board of education and a teacher shall cease and determine and be of no effect against said board whenever said board shall ascertain by notice in writing received from the county or city superintendent or otherwise, that said teacher is not in possession of a proper teacher's certificate in full force and effect, notwithstanding the term or engagement for which such contract shall have been made may not then have expired. The State Superintendent of Public Instruction shall prepare and distribute blanks for contracts between boards of education and teachers."

APPENDIX "C".

CHARLES D. OFFHOUSE, et al., *Petitioners*,

vs.

STATE BOARD OF EDUCATION and BOARD OF EDUCATION OF THE CITY OF PATERSON, *Defendants*.

The opinion of the court was delivered by

HEHER, *J.*:

Petitioners, 314 in number, are either teachers, principals or supervisors in the public school system of the City of Paterson who are under the tenure prescribed by R. S. 18:13-16 and 18:13-17. On March 5th, 1941, they filed a joint petition of appeal with the State Commissioner of Education alleging that the district board of education had refused to conform to a salary schedule prescribed by a rule of the board adopted on July 14th, 1927, in the exercise of the authority conferred by R. S. 18:13-5. The rule provided for the payment of fixed annual salary increments until the stated maximum salary had been reached. The Commissioner dismissed the petition. The State Board of Education affirmed the judgment. Mr. Justice Colie denied certiorari; and the application is renewed here.

The decisive question is whether this annually progressive salary schedule of 1927 remained in force at the time the jurisdiction of the State Commissioner was thus invoked. The schedule was observed until May 12th, 1932, when the local board, by resolution, ordered a 5% reduction of the salaries of all of its employees. And thereafter, during the school years 1933-34, 1934-35, 1935-36 and 1936-37, there were salary reductions ranging from 6% to 30%, pursuant to the statutes enacted to alleviate the financial stress consequent upon the trade depression. Pamph. L. 1933, ch. 12, p. 24, ch. 494, p. 1247; Pamph. L. 1935, ch. 6, p. 16; Pamph. L. 1936, ch. 7, p. 17, ch. 27, p. 42. The reductions continued until October 14th, 1937, when the local board resolved that "all resolutions heretofore

adopted and approved" by it, providing for "a reduction in the basic salary of the officers and employees of the Board * * * be rescinded as of October 1st, 1937;" and that "on and after October 1st, 1937, all officers and employees be paid the base salary in accordance with the terms of their employment, providing the aforesaid officers and employees waive all claims, demands, damages or liabilities, which they have had or now have for or on account of any and all reductions made or effected prior" thereto.

The Commissioner ruled that the "salary schedule became inoperative;" and the State Board concluded that other regulations limited "the right to increases in salary to those recommended by the superintendent [of schools] and the committee on education;" that "satisfactory service" is not sufficient in itself; that "the rules and regulations of a non-continuous body, such as a board of education, * * * do not bind successor boards unless they are expressly adopted or tacitly by acting thereunder;" and that the evidence conclusively demonstrates that "the several boards of education since July 1st, 1933, have not observed the rule relating to salary increases—in fact, by their disregard of such rule it may be said it was abrogated by 'negative action.'"

The contention made by petitioners is that the increments prescribed by the schedule of 1927 were conditioned solely on "satisfactory service," and hence they became a part of the individual teacher's salary so that non-payment of the increases accruing thereunder constituted a reduction in salary in contravention of section 18:13-17, supra. No claim is advanced for the reductions made during the years 1933 to 1937; but it is maintained that since July 1st, 1937, the petitioners have been, and hereafter will be, entitled to compensation on the basis of accrued increments under the regulation of 1927, in accordance with the number of their respective years of service, as if legislation authorizing salary reductions during the years 1933 to 1937 had not been passed. We take a different view.

It is conceded that, by the term "base salary" in the resolution of 1937, the local board had in contemplation the salaries paid in 1932, before the first reduction became

operative. It could hardly have any other meaning, for the "base salary" of the individual teacher at the time of the initial reduction included the increments which had then accrued. This understanding of the term was made manifest by the board's course of action following the adoption of that regulation. Thereafter, salaries were paid at the 1932 level until June, 1940, when teachers receiving an annual salary of $1,700, or less, were given what petitioners characterize as "an arbitrary increase of $100 each," while the salaries of all others continued at the 1932 rate. There have been no appropriations for increments since the passage of the resolution of 1932; and the superintendent of schools has since made no recommendations to the district board for salary increases in consonance with the schedule of 1927, although that had been the consistent practice theretofore. And there seems to have been no appeal by the petitioners from the action thus taken by the local board in 1937 until the instant proceeding was instituted.

The salary by-law of 1927 was repealed by implication. The reduction of salary effected by the resolution of 1932 was at the rate of 5% "of the salary received during the calendar year, 1932;" and the subsequent reductions were a fixed percentage of that salary, not of that salary enlarged by increments under the pre-existing schedule. The rule of 1937 provided merely for the payment of "the base salary in accordance with the terms" of the "employment," i. e., the salary fixed in 1932 conformably to the then existing schedule, and not such salary as increased by annual increments. The base salary of 1932 was determined, in part, by the number of years of service. There is no indubitable expression of a design to revive the salary schedule of 1927. In all seeming, these by-laws of 1932 and 1937 were each designed to occupy the whole field embraced by the earlier rule, and so as a substitute therefor. Compare *Burlington* v. *Estlow*, 43 N. J. L. 13. And, if there be doubt as to this, we are aided by the construction put upon the rules by the successive boards charged with the administration of the school system in this district.

Contemporary exposition may be considered, and is ordinarily accorded great weight, where the language of a

municipal regulation is of doubtful import and is not made plain by the context. The meaning attributed to the rule soon after its adoption by the authority charged with its enforcement is generally the best construction; and it will be accepted unless clearly wrong, especially where it has received the acquiescence of those affected by its terms. And a local or special act may be practically construed by the parties for whose purposes it was enacted, so as to induce an acceptance of their interpretation without reference to the length of the time covered by such practical construction. *Lewis' Sutherland Statutory Construction* (2d ed.), § 472.

Salary regulations by district boards of education are repealable. R. S. 18:13-5. Only accrued increments under a valid and subsisting regulation of the local board are beyond repeal. Unaccrued increments do not take the classification of "salary" within the intendment of section 18:13-17, supra. *Greenway* v. *Camden Board of Education,* 129 N. J. L. 46; affirmed, Id. 461. And, while in the view we take of the case there is no occasion to consider the point here, it is to be noted that this court has held that non-observance of a salary schedule "for many years" constituted abrogation. *Liva* v. *Board of Education,* 126 Id. 221. See, also *Weber* v. *Board of Education of Trenton,* 127 Id. 279. The last cited case is also invoked by petitioners. But there the opinion reveals "an express declaration of the local board not to abandon the salary schedule."

Lastly, it is urged that "the undertaking of the local board to pay salaries to the petitioners" under the regulation of 1927 "was contractual in nature, and the local board's alleged repeal or rescission of the schedule" therefore violates article 1, section 10, of the Constitution of the United States, prohibiting the states from passing any law impairing the obligation of contracts.

The line of argument is that the relationship between teachers and the district boards must be evidenced either (1) "by rules and regulations adopted pursuant to R. S. 18:13-5," or (2) "by written contracts of employment executed in accordance with the provisions of R. S. 18:13-7;" and that the "same rule that would be applied had the local

board contracted individually with the petitioners pursuant to R. S. 18:13-7, must be applied to this case, where the local board contracted collectively with the petitioners pursuant to R. S. 18:13-5." It is said, further, that where a local board has exercised the legislatively conferred "power to contract," it is "bound in the same manner that an individual is bound."

The point is plainly without substance. As to unaccrued increments, the provisions of the salary schedule are, by the very terms of the statute investing the district boards with authority to fix salaries, subject to repeal or alteration by the board itself. R. S. 18:13-5. Until the accrual, the modification or repeal of the rule providing for increments does not constitute a reduction of salary within the intendment of R. S. 18:13-17. A regulation providing for increments is a mere declaration of legislative policy that is at all times subject to abrogation by the local board in the public interest. *Greenway* v. *Board of Education*, supra. And it is now settled that sections 18:13-16 and 18:13-17 invest teachers and principals in the appointed category with a mere "legislative status," subject to legislative alteration and amendment, and does not give use to an irrepealable "legislative contract." Section 18-13-7, supra, is "but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with an individual teacher." *Phelps* v. *Board of Education*, 115 N. J. L. 310; affirmed, 116 Id. 412; affirmed, 300 U. S. 319; 57 S. Ct. 483; 81 L. Ed. 674. Permanent tenure teachers are in the one category, however the employment relationship may have originated.

The petition is dismissed, with costs.

No. 311

AUG 3 1944

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES D. OFFHOUSE, *et als.*,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON IN THE COUNTY OF PASSAIC, a corporation,
Appellee,

On Appeal from the New Jersey Supreme Court.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES D. OFFHOUSE, *et als.*,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON IN THE COUNTY OF PASSAIC, a corporation,
Appellee.

On Appeal from the New Jersey Supreme Court.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

This brief is filed pursuant to Rules 7 and 12, in opposition to the appellee's motion to dismiss this appeal or to affirm the judgment of the New Jersey Supreme Court. The appeal in this case was allowed by the Chief Justice of the New Jersey Supreme Court by order dated July 3, 1944.

The appellants are employed as teachers in the public schools of the City of Paterson. The appellee, the Board of Education of the City of Paterson, a municipal corporation, is their employer. The appellee, in October, 1921, adopted rules and regulations governing the employment of its teacher employees, their salaries, and the mode and time of payment thereof, as authorized by the statutes of New Jersey.* By resolution adopted October 14, 1937, the

* The pertinent statutes are set out in full in the appendix to the Appellants' Statement of Jurisdiction.

appellee repealed those rules and regulations, and has since failed to pay the appellants at the rates provided therein. The question involved in this appeal, is whether the repeal by the appellee of its rules and regulations impaired the obligation of a contract between the appellee and the appellants, engaged by the appellee under those rules and regulations, contrary to Article I, Section 10 of the Constitution of the United States.

The facts have been fully set out in the Appellants' Statement of Jurisdiction filed herein pursuant to Rule 12. Since those facts have not been challenged or controverted in any way in the appellee's motion to dismiss, they will not be elaborated upon or repeated here.

The appellee's motion to dismiss or affirm is based upon four grounds. In opposition to each of those four grounds, the appellants will here establish the following propositions:

I. The Federal question was properly raised in the state courts.

II. The judgment of the New Jersey Supreme Court was based solely upon a Federal ground.

III. The Federal question involved in this appeal is substantial.

IV. The judgment appealed from was rendered by the highest court of New Jersey in which a decision in the suit could be had.

ARGUMENT.

POINT I.

The Federal question was properly raised in the state courts.

Inspection of the opinion of the New Jersey Supreme Court,* discloses that the New Jersey Supreme Court considered and passed upon the appellants' contention that the appellee's repeal of its rules and regulations constituted an impairment of contract contrary to Article I, Section 10 of the Constitution of the United States. Under such circumstances, this Court will not inquire whether, under state practice, the question might have been raised at any earlier point in the proceedings.

Sully v. *American National Bank,* 178 U. S. 289;
Chicago, Rock Island & Pacific Railway Co. v. *Perry,* 259 U. S. 548;
Home Insurance Co. v. *Dick,* 281 U. S. 397;
Whitfield v. *Ohio,* 297 U. S. 431.

Incidentally, the New Jersey Supreme Court was the first tribunal in which the power to pass upon the Federal question admittedly resides. This aspect of the jurisdictional requirements has been discussed in the Appellants' Statement of Jurisdiction under Part IV.

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* The opinion appears in the appendix to the Appellants' Statement of Jurisdiction.

POINT II.

The judgment of the New Jersey Supreme Court was based solely upon a Federal ground.

The rule for judgment entered in the New Jersey Supreme Court does not disclose the grounds upon which it is based. To determine those grounds, recourse must be had to the opinion of that court. In inquiring whether a judgment is based upon Federal grounds, the conclusions of the trial court are not considered; only the final action of the highest court of the state before which the case could be brought, as evidenced in its opinion, is material to the inquiry.

> *Allen* v. *Southern Pacific Railroad Company*, 173 U. S. 479.

An analysis, paragraph by paragraph, of the opinion of the New Jersey Supreme Court in support of the judgment below, shows conclusively that the determination of the Federal question was essential to the judgment entered, and that, without determination of the Federal question, there could have been no final disposition of the case.

The first paragraph of the opinion below contains a brief history of the litigation. The second paragraph recites some of the pertinent facts, and the third paragraph reviews the determinations of the Commissioner of Education and the State Board of Education, the statutory tribunals initially vested with jurisdiction to try the dispute.

Paragraph 4 discusses the contentions made by the appellants here (petitioners below). The fifth paragraph

defines "base salary" and continues with a narration of further facts.

In paragraph 6 appears the first point decided by the New Jersey Supreme Court; namely, that the rules and regulations were repealed by the appellee. It had been argued on behalf of the appellants that there had been no effective repealer of the rules and regulations adopted by the appellee, and paragraphs 6 and 7 of the opinion below constitute the New Jersey Supreme Court's answer to that contention. No issue is raised in this Court on this aspect of the decision below, since the question whether the appellee enacted a repealer is purely one of state law. It was necessary for the state court to find that a repealer had been enacted, before it could determine that the repealer was effective.

In paragraph 8, the New Jersey Supreme Court finds that "Salary regulations by district boards of education are repealable." That is the precise question involved in this appeal. The pronouncement of the New Jersey Supreme Court does not furnish an independent non-Federal ground for its decision, because that pronouncement is inextricably bound up with a consideration of the contractual nature of salary regulations. This Court is not bound by the state court's determination, even though a question of local law is involved. The very same argument against jurisdiction made by the appellee here, was made by the respondent in *Indiana ex rel Anderson* v. *Brand*, 303 U. S. 95, where this Court said, at page 100,

> "* * * The Supreme Court has decided, however, that it is the state's policy not to bind school corporations by contract for more than one year.

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts."

The concluding paragraphs of the opinion deal with the Federal question raised by the appellants. The New Jersey Supreme Court makes the flat assertion that there is no contractual relationship in New Jersey between tenure teachers and boards of education which have hired those teachers pursuant to rules and regulations, and that, as a result, there is no violation of Article I, Section 10 of the Constitution of the United States when the rules and regulations are repealed.

This analysis of the opinion of the court below demonstrates the complete absence of any non-Federal ground for decision. As a matter of fact, the appellee, in its statement opposing jurisdiction, points to no independent non-Federal ground for the decision of the New Jersey Supreme Court, as evidenced in that court's opinion. The appellee's discussion deals solely with the determinations of the Commissioner of Education and of the State Board of Education, upon neither of which the New Jersey Supreme Court based its decision.

The appellee asserts the existence of non-Federal grounds for the decision of the court below. They are:

(a) Even if a contract was involved, the provisions of the state statute, which permitted change, amendment or repeal of rules and regulations, was incorporated in the contract, and became an integral part thereof.

The short answer to this contention is that the existence of the contract and the nature and extent of its obligation became Federal questions for the purpose of determining whether there has been a violation of the provisions of Article I, Section 10 of the United States Constitution, and, for this purpose, finality is not, and cannot be accorded to the views of a state court.

Indiana ex rel Anderson v. *Brand, supra;*
Irving Trust Co. v. *Day,* 314 U. S. 556.

The New Jersey courts have, furthermore, held that the power to amend rules and regulations may not be exercised to the disadvantage of tenure teachers, in which class all the appellants belong*. *Gowdy* v. *State Board of Education,* 84 N. J. L. 231; affirmed, 85 N. J. L. 726; *Weber* v. *Trenton Board of Education,* 125 N. J. L. 611; affirmed, 127 N. J. L. 279.

(b) That, according to the rules and regulations adopted by the appellee, no increase provided for in the rules and regulations was payable, until a particular recommendation was made by the appellee's agents for an increase; that no such recommendations were made after 1933; and that, as a result, the appellants are barred from recovery. The New Jersey Supreme Court made no such finding; its judgment was not based in whole or even in part on such a proposition. The argument here advanced by the appellee to oppose jurisdiction in this Court, is based

* See discussion *post,* pages 10, 11, 12, and 13.

entirely upon the conclusion of the Commissioner of Education and the State Board of Education. In the argument presented before the statutory tribunals, the appellants urged that, under the numerous New Jersey cases cited by them, the appellee could not defeat the right of the appellants to increases in salary by the simple expedient of instructing its agent not to recommend such increases. In answer to this contention, the State Board of Education said (Record, p. 84):

> "The cases cited by appellants on this point relate to the interpretation of contracts. The rules and regulations of respondent are not contracts."

It is obvious, therefore, that, even if it is competent to examine the opinions of the statutory tribunals, they in turn are based upon the non-existence of a contract, a determination which this Court will make for itself, notwithstanding the finding of the state courts.

Indiana ex rel Anderson v. *Brand, supra;*
Irving Trust Co. v. *Day, supra.*

POINT III.

The Federal question involved in this appeal is substantial.

The appellee asserts that the Federal question raised is without substance, because it has been "so explicity foreclosed by prior decisions as to afford no basis for a writ of error." There is nowhere any decision on the precise point raised by this appeal, except in the opinion of the court below supporting the judgment which is the subject of this appeal. There is no adjudication, elsewhere

than in this case, that the repeal by a local board of education of rules and regulations adopted by it, pursuant to which teachers were hired, did not involve an impairment of contract contrary to the provisions of Article I, Section 10 of the Constitution of the United States. *Phelps* v. *Board of Education,* 300 U. S. 319, decided only that the New Jersey tenure law (see part VI of the Statement of Jurisdiction) did not, in and of itself, confer a contractual status upon New Jersey teachers. In that case, this Court said (300 U. S. at p. 323):

> "* * * we find nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year."

There were no rules and regulations in evidence in the *Phelps* case.

The sole statute before this Court for construction in the *Phelps* case was the tenure law, P. L. 1909, Ch. 243*. The effect of Section 106 of Chapter 1, P. L. 1903, Second Special Session,* authorizing adoption of rules and regulations in lieu of written contracts, was not in issue there. The question involved here is whether a contract arose between the appellants and the appellee when the appellee adopted its rules and regulations; a far different question than that involved in the determination whether the tenure law, standing alone, created a contract, the situation treated in the *Phelps* case.

The Federal question here raised, was not raised, argued, or decided in *Greenway* v. *Camden Board of Education,* 129

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* The statute is set out in full in the appendix to the Appellants' Statement of Jurisdiction.

N. J. L. 46, or in *Liva* v. *Board of Education*, 126 N. J. L. 221, or in *Redcay* v. *State Board of Education*, 130 N. J. L. 369; affirmed 131 N. J. L. 326. There is a complete lack of precedent. There is, therefore, no ground for the contention that the appeal is foreclosed by prior adjudicated cases.

Examination of precedents in New Jersey will throw light on the basis of the appellants' claim of contract. *Gowdy* v. *State Board of Education, supra*, was decided by the New Jersey Supreme Court in 1913. It was affirmed, without opinion, by the Court of Errors and Appeals in 1914. In that case, the prosecutrix was employed as a teacher by the Paterson Board of Education, which had adopted rules and regulations providing for the payment of annual salaries in 10 monthly installments. The Paterson Board enacted a resolution providing for the payment of salaries in 12 equal installments. The New Jersey Supreme Court said, in interpreting the same statutes involved in this appeal (84 N. J. L. at pp. 232 and 233):

> "The prosecutrix had served three consecutive years as such school teacher, and therefore, under section 106 a (Comp. Stat., p. 4763), she holds her employment during good behavior and efficiency and is not subject to a reduction of salary except for causes specified in said section, and they are not pertinent to the inquiry here. Section 106 of the Public School act (Comp. Stat., p. 4762), *inter alia*, provides: 'Board of education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment and the promotion and dismissal of such teachers and principals, the salaries, time and mode of payment thereof, and may from time

to time change, amend or repeal such rules and regulations. The employment of any teacher by such board and the rights and duties of such teacher with respect to such employment shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto.'

"It is insisted by the defendants that by virtue of this provision the board of education of the city of Paterson had a right to change, amend or repeal such rules and regulations in force, and therefore the resolution to change from the ten-payment plan to the twelve-payment plan was an authorized act. If the effect of this change reduced the salary of the prosecutrix (and we think it does) the resolution is ineffectual as to her, she being within the protection of section 106a, which clearly forbids the reduction of the salary of a teacher who has completed three consecutive years of service. Furthermore, this act is a later act than the section which gives the department the right to change its rules and regulations, and the two acts must be read together. • • • We think that such a result is in effect an impairment of the contract and in clear violation of section 106a."

In 1941, the New Jersey Supreme Court in *Board of Education* v. *State Board of Education*, 125 N. J. L. 611, 614, said, in discussing the effect of the *Gowdy* case, *supra:*

"Subsequent disadvantageous changes in the schedule cannot affect those who have acquired tenure. *Gowdy* v. *State Board of Education*, 84 *Id.* 231; *affirmed*, 85 *Id.* 726."

In *Weber* v. *Board of Education, supra*, decided by the New Jersey Court of Errors and Appeals in 1941, it was said, in holding invalid a resolution of the Trenton Board

of Education providing for the payment of salaries in amounts different from those provided by rules and regulations (127 N. J. L. at pages 284, 285, and 286):

> "Moreover, the power to make rules and regulations with respect to teachers and their employment does not carry with it the right to abrogate definite salary contracts.
>
> • • • • • •
>
> "The case of *Gowdy* v. *State Board of Education*, 84 N. J. L. 231, is discussed. That case holds that if the effect of an act is to reduce the teachers' salary, it violates the statute. Appellant seeks to maintain that the correct interpretation and objective of the statute is to preserve basic salaries and to bar infringement upon them, but that the true interpretation does not extend to insurance against changes relative to increases merely because those changes might be disadvantageous to the teachers. • • • In saying that the *Gowdy* opinion is against decrease of basic salary, but not a bar to elision of increases, appellant again follows a form of begging the question, for as stated above, the crucial point is whether or not the annual increments are inherently part of the so-called basic salary.
>
> "Support for the right to abolish a salary schedule is invoked by appellant in the case of *Liva* v. *Board of Education, Lyndhurst Township*, 126 N. J. L. 221. That right is not disputed by respondents so long as it is not made to extend to teachers who acquired tenure, and appellant admitted the propriety of this exception. The *Liva* case is not on fours with the present facts. It proceeded on the supposition that there was no salary schedule in effect, and that hence the local board in that case did not undertake to grant automatic increments. In the

case now under review we have a salary schedule that must be taken into account."

• • • • • •

"The annual increments were integral parts of the salaries, effective when the designated year of service had been attained, that having been the contract with the teachers. It is a statutory requirement that there be a salary schedule, or in its absence, a specific contract with the teacher. The annual increment in a salary schedule is not a prospective increase, subject each time to control of the local authorities before it becomes absolute. It is intrinsically part of the salary, vesting contractually and becoming operative in the various stages of time spaced by the schedule. To hold otherwise would negative the schedule, convert it into a meaningless and futile gesture and be incongruous with the provisions in the local regulations. The resolution in question, though called an equalization measure, had for its effect the curtailment of the salaries of the respondent teachers for the indicated years. The salary schedule was not subject to change or amendment by the local Board, so that its resolution attempting such a result was void."

POINT IV.

The judgment appealed from was rendered by the highest court of New Jersey in which a decision in the suit could be had.

The local practice followed in this case is explained in Part IV of the Appellants' Statement of Jurisdiction. There is no substance whatsoever in the appellee's claim that an appeal will lie to the New Jersey Court of Errors

and Appeals. The cases cited by the appellee have nothing whatsoever to do with the right of appeal from the refusal of the New Jersey Supreme Court to grant a writ of certiorari. The writ in New Jersey is a prerogative writ lodged in the absolute discretion of the New Jersey Supreme Court, whose determination on whether a writ should be allowed is not subject to review by the New Jersey Court of Errors and Appeals.

Johnson v. *Board of Embalmers*, 107 N. J. L. 380;
Daniel B. Frazier Co. v. *Long Beach*, 110 N. J. L. 221;
Post v. *Anderson*, 111 N. J. L. 303;
Ford Motor Co. v. *Fernandez*, 114 N. J. L. 202;
Pennsylvania R. R. Co. v. *Board of Public Utility Commissioners*, 116 N. J. L. 527;
Wedgest v. *Globe Porcelain Co.*, 125 N. J. L. 438;
Staubach v. *Cities Service Oil Co.*, 130 N. J. L. 157.

It is hardly conceivable that the Chief Justice of the New Jersey Supreme Court, a member of the New Jersey Court of Errors and Appeals, would have signed the order allowing the appeal to this Court, if an appeal would lie to the New Jersey Court of Errors and Appeals.

For the reasons herein and in the Appellants' Statement of Jurisdiction set forth, it is respectfully submitted that the appellee's motion should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 311

CHARLES D. OFFHOUSE, ET AL.,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON, IN THE COUNTY OF PASSAIC,

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 311

CHARLES D. OFFHOUSE, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON, IN THE COUNTY OF PASSAIC,

Appellee.

STATEMENT BY APPELLEE OPPOSING JURISDICTION, WITH MOTION TO DISMISS, AND IN THE ALTERNATIVE MOTION TO AFFIRM.

The Appellee states the following matters and grounds against the jurisdiction of this Court, as asserted by the Appellant herein in his statement of the basis of the Appellate jurisdiction, filed herein on the third day of July, 1944, as required by Rule 12, Paragraph 3 of this Court.

This appeal challenges the right of a Board of Education to abrogate or rescind a salary increment schedule on the theory that once having been adopted, an irrepealable contract was created by virtue of the New Jersey Tenure Law.

The opinion of the New Jersey Supreme Court is officially reported in 131 N. J. L. 391, affirming the decisions of the New Jersey State Board of Education, and the Commissioner of Education, reported at pages 77-87 and 65-74 of the record below, respectively.

I.

The Federal question was not properly "raised" in the State Courts. Pursuant to the applicable State Statute, this proceeding was commenced by a petition of appeal (pages 18-29 from record below) to the Commissioner of Education. It was alleged that Appellee had violated the provisions of the State Tenure Law which inhibited against reducing salaries of tenure teachers. No charge was made, not even a suggestion, that a contract was involved, nor that a Federal question was to be determined. A breach of Article 1, Section 10, of the Federal Constitution does not appear either in the pleadings, the record, argument of counsel, nor memoranda filed with the trial court. No request to rule on this question was presented to the Commissioner and his determination made no mention thereof. Appellants conceded that no contract was involved in acknowledging and admitting the right of the Legislature to effect changes in salary, even if in so doing it proved disadvantageous to tenure teachers.

The Federal question was not raised, nor relied upon in the first New Jersey tribunal, which had jurisdiction to decide it. There is no law which prohibits a statutory tribunal from passing on constitutional questions of recent enactment. To assume that the Commissioner would have declined to do so is unwarranted and of no consequence. The question should have been advanced if Appellants intended to rely thereon.

On appeal to the State Board of Education, Appellants reaffirmed their position before the trial court, and, in addition, for the first time alleged the Federal question. The appeal was determined on the record below and affirmed on the State issues. The Appellate Court declined to adjudicate the Federal question, it not being necessary for a determination of the cause (pages 79-87 from record below).

In the application to the Supreme Court, all previous grounds were reasserted and the Federal question was projected (pages 2-9 from record below). There was an affirmance on the State issues and a ruling on the Federal question that no contract was impaired because none existed.

The theory on which a cause has been tried must be adhered to on appeal and the Appellate Court will normally refuse to consider questions which have not been raised below. *Reidy* v. *Myntti,* 116 F. (2nd) 725. Litigants must not have the opportunity or incentive to obtain an appellate reversal on grounds that were not disclosed at the trial. *New York Life Ins. Co.* v. *Calhoun,* 114 F. (2d) 526.

The constitutional question must be seasonably and sufficiently drawn in question in order to meet the jurisdictional requirements of the Judicial Code. It cannot as here be merely incidental.

II.

The State Court decision was not based on the determination of the Federal question. The theory of the Appellee in justification of its refusal to grant increments was that these increases in salary under the schedule were by its rules not automatic in its operation, but conditioned upon a recommendation for an increase both by the Superintendent of Schools and the Committee on Education (page 69 of record below—Post Appendix A); that since no such recommendations had been made since 1932, and no increases under the schedule had in fact been given and this practice had been acquiesced in by the Appellants over a period of nine years, that the schedule had become inoperative and no longer in force and effect; that the State Law R. S. 18:13-5 (Post Appendix B), which is the authority for adopting a salary schedule, specifically provides that "a board may from time to time change, amend or repeal such rules and regulations", and that pursuant to this provision, Appellee, by

formal resolution (Post Appendix E), on October 14, 1937, rescinded the salary schedule. This resolution was designed to occupy the whole field embraced by the earlier rule, and so as a substitute therefor (New Jersey Supreme Court Decision), Appellants countered with the argument that "satisfactory service," and not a recommendation, was the condition precedent for an increase; that the increments under the schedule were automatic; that the quoted provision from the rules governing the employment under R. S. 18:13-5 were not applicable to Appellants who had acquired tenure.

The trial court ruled on and determined each of these contentions against Appellants (pages 65-74 from record below). The State Board and the Supreme Court successively affirmed these findings of the trial court. Issues other than the Federal question were necessarily involved in this controversy. The decisions of the State Courts were predicated upon grounds which did not embrace the Federal question. The determination was, that even if a contract was involved, the provision of the State Statute, which permitted change, amendment or repeal, was incorporated in the contract, and became an integral part thereof. That determination disposed of the controversy without recourse to the Federal question. That the State Courts so viewed the determination is exemplified by the fact that they did not find it necessary, and, consequently, refrained from ruling on the defenses of laches, waiver, estoppel, acquiescence and contribution, asserted by Appellees.

The determination that according to the rules and regulations of Appellee, a recommendation for an increase was a necessary condition precedent to an increase, of itself, and without more, made it unnecessary to determine the Federal question, even if it had been properly presented. See *S. W. Bell Tel. Co.* v. *Oklahoma,* 303 U. S. 206; *De Saussure* v. *Gaillard,* 127 U. S. 216; *Johnson* v. *Risk,* 137

U. S. 300; *Wood Moving & Reaping Machine Co.* v. *Skinner*, 129 U. S. 293.

On appeals from State Courts' judgments, where it appears that notwithstanding Federal question, judgment rests on adequate non-federal ground, and hence would not be affected by the Supreme Court's decision on Federal question, appeal will be dismissed. *U. S.* v. *Hastings*, 296 U. S. 188; *Williams* v. *Oliver*, 53 U. S. 111.

It does not appear from the record that a Federal question "was necessarily involved in the decision; and that the State Court could not have given the judgment or decree, which they passed, without deciding it." *Armstrong* v. *The Treasury of Athens County*, 41 U. S. 279. Therefore, it is a matter of no consequence to this Court that the State court may have gone further and decided a Federal question. *Moore* v. *Mississippi*, 88 U. S. 636. Where a case in this Court can be decided without reference to any question arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. *Silver* v. *L. & N. R. R. Co.*, 213 U. S. 175.

This Court does not decide "questions of a constitutional nature, unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U. S. 295.

The Federal question was only incidental. The independent ground is broad enough to sustain the decision.

The State Courts' opinions indicate that they construed the resolution of October 14, 1937, as being a valid exercise of the authority vested in it by the State's Statute to "change, amend or repeal" its own rules and regulations. These opinions involved purely a matter of local law. A Federal question was not decided by the State Court, nor was its decision necessary to a determination of the cause.

Thus, not only has this Court the interpretation placed

upon a local law, the salary schedule of Appellee by its State Courts, but it also has the construction by the State Courts of comparable statutes in dealing with similar salary schedules adopted by other local Boards of Education. In *Greenway* v. *State Board of Education of Camden*, 129 N. J. L. 46, the New Jersey Supreme Court held that a Board of Education could amend, rescind or abolish a salary schedule and that this action "did not constitute the impairment of any contractual rights." In 129 N. J. L. 461, at page 464, the Court of Errors and Appeals in affirming, and ruling against the contention that the Camden salary schedule covers not alone the current salary, but extends as well to all future increases, said: "This would mean that the action of one Board providing for salary increases *in futuro* would bind all its successors. The statute is not so framed. The Legislature has not invested the local courts with contractual power of such sweep. Such an interpretation would constitute a palpable distortion of the letter and spirit of the enactment." See *Liva* v. *Board of Education of Lyndhurst*, 126 N. J. L. 221.

Such interpretation by the New Jersey Courts of a State Statute will be accepted by this Court and does not raise a Federal question properly reviewable by this Court. *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660; *Carstairs* v. *Cochran*, 193 U. S. 10; *Tampa Waterworks Company* v. *City of Tampa*, 199 U. S. 241; *Quong Ham Wah Company* v. *Industrial Accident Company*, 225 U. S. 445; *Terrace* v. *Thompson*, 263 U. S. 197; *Supreme Lodge, etc.* v. *Meyer*, 265 U. S. 30; *American Ry. Express Co.* v. *Commonwealth of Kentucky*, 273 U. S. 269.

In *Bachtel* v. *Wilson*, 204 U. S. 36, this Court held that before it can pronounce a judgment of a State Court to be "in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was."

It is respectfully submitted that jurisdiction should be declined because a Federal question of substance was neither presented to, nor decided by the State Court, nor was a Federal question necessary to the determination of the cause.

III.

The Federal question is not substantial. The subject matter of the controversy is not inherently Federal. The question must be sufficiently substantial to support the appeal in order to sustain jurisdiction. *Zucht* v. *King*, 260 U. S. 174.

A Federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a Writ of Error. *Leonard* v. *Vicksburg R. Co.*, 198 U. S. 416.

The fundamental issue involved is whether the relationship between a teacher and his employing board under New Jersey Law established a contract within the meaning of the Federal Constitution. It has been resolved in the negative both by the State Courts and this Court.

A contract must exist before it can be impaired. It is not necessary to consider the effect or validity of either the resolution complained of, or the action taken thereunder, unless and until Appellants have established a contract right.

Appellants pose a fictitious Federal question which is devoid of merit and unsubstantial because it is concluded by previous authority. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102.

The contention of Appellants that their employment constitutes a contract is derivative from the so-called Tenure Law of New Jersey, the pertinent provisions of which appear in Section 1 of Chapter 243 of the Laws of 1909, now Sections 18:13-16 and 18:13-17 of the Revision of 1937 (Post Appendix C & D). It has been held that these pro-

visions confer upon teachers and principals in the appointed category, a mere "legislative status" subject to legislative alteration and annulment, and does not give rise to an irrepealable legislative contract. *Greenway* v. *Board of Education of Camden, supra.*

That the Tenure Law of New Jersey creates no contract has been recognized and determined by the State's highest Court consistently in sustaining lower Court decisions. *Redcay* v. *State Board of Education,* 130 N. J. L. 369; aff'd 131 Id. 326. It was similarly construed by this Court in *Phelps* v. *Board of Education of West New York,* 300 U. S. 319, in affirming both the Court of Errors and Appeals, 116 N. J. L. 412, and the Supreme Court of New Jersey, 115 Id. 310.

Neither *Gowdy* v. *State Board of Education,* 84 N. J. L. 231, aff'd 85 N. J. L. 726, nor *Weber* v. *Board of Education,* 127 N. J. L. 279, relied upon by Appellants as authority for the proposition that the adoption of a salary schedule creates an irrepealable contract within the purview of the Federal Constitution so as to guarantee prospective salary increments, so hold. In the former case, the determination was that there had been a violation of the State Statute prohibiting reductions from "base" salary. The Federal question was not involved. The latter case decided that increases under a salary schedule which was in force and effect, and which had "accrued" and become vested, were beyond recall. It did not, however, deny the right to refuse prospective increments. These decisions are consistent and not in conflict with the decisions of the State Courts cited by Appellee.

The New Jersey Court of Errors and Appeals held in *Greenway* v. *Board of Education of Camden, supra,* and the New Jersey Supreme Court similarly held in the instant case, that the principle in the *Weber* case is not applicable

since the issue here involved is whether Appellants are entitled to prospective increments which have not "yet accrued" and which could only vest in the event of a valid subsisting contract.

Appellants' contention is that just as there was need for enabling legislation in New Jersey, in 1932, to permit local boards to reduce salaries, a similar need exists to validate the resolution of October 14, 1937. By virtue of the authority vested in local boards by the enabling legislation of 1933 to 1936, they paid their employees lesser sums than what they had last received. There was in fact a reduction from "base" salary. That need arose because the State Statute prohibited reductions by local boards, and not because of any contract right. The resolution which is now assailed as invalid did not purport to, nor did it in fact reduce salaries below the highest amounts attained. They merely denied prospective increases. Failure to receive increases prospectively is not repugnant to the State's Statute prohibiting reductions. *Greenway* v. *Camden, supra,* and *Liva* v. *Lyndhurst, supra.* The situation in the cases cited is comparable with the instant case. There is no need for enabling legislation to validate the resolution in question.

In *Phelps* v. *Board of Education of West New York, supra,* this Court held in sustaining the State Courts, that the provisions of Chapter 243 of New Jersey, P. L. 1909, the so-called Tenure Law did not create contracts with individual teachers; but that "the status of tenure teachers while in one sense, perhaps, contractual, is in essence, dependent upon a statute like that of the incumbent of a statutory office, which the Legislature at will, may abolish, or whose emoluments it may change."

This Court is not bound by the decision of a State Court as to the existence and terms of a contract, the obligation of which is asserted to be impaired; but where a statute is

claimed to create a contractual right, we give weight to the construction of the statute by the Courts of the State. *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 595; *Tampa Water Works Co.* v. *Tampa,* 199 U. S. 241, 243; *Seton Hall College* v. *South Orange,* 242 U. S. 100, 103.

Applying this doctrine results in divesting the Federal question asserted of merit and substance. The distinction asserted by Appellants in their allegation that there is not in issue in the instant case the question of the constitutionality of the Acts of the Legislature such as existed in the *Phelps* case, but, rather, the constitutionality of a resolution of the Appellee which admittedly has not been construed by this Court, is in the language of the Supreme Court of New Jersey, "plainly without substance." The fundamental issue is identical.

Since the Phelps decision, this Court construed the Teachers' Tenure Act of Indiana as creating a contract within the protection of the Contract Clause of the Federal Constitution. In *Indiana* v. *Brand,* 303 U. S. 95, this Court, however, specifically stated that this interpretation was due to the fact that the "Courts of Indiana have long recognized that the employment of school teachers was contractual * * * that no more apt language could be employed to define a contractual relationship than was used by its Legislature in creating its Teachers' Tenure Law * * * that until its decision in the present case, the Supreme Court of the State had uniformly so held * * *; Also that the decision in *Phelps* v. *Board of Education,* 300 U. S. 319, that the Act there considered did not create a contract, is not, authority for a like result here."

Appellants have no vested right in either the provisions of the Tenure Act, or the Rules and Regulations adopted by the Appellee, pursuant to Legislative authority. *Salt Co.* v. *East Saginaw,* 80 U. S. 373; *Ettor* v. *Tacoma,* 228 U. S. 148.

IV.

The statute relied upon by appellants to sustain the appellate jurisdiction of this Court is not applicable for the reason that appellants neglected to invoke the jurisdiction of the highest Court of the State in which a decision could be had. The judgment is not final in the sense that it is subject to review in the New Jersey Court of Errors and Appeals.

> The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all cases as heretofore; • • • Article VI, Section 1, Paragraph 1, of New Jersey State Constitution.

Even though the refusal of the New Jersey Supreme Court to grant a Writ of Certiorari was a discretionary act, and generally matters resting in the discretion of the courts are not subject to review in the appellate courts, nevertheless such is not the rule where there is an abuse of discretion. *State, Newall* v. *Bassett,* 33 N. J. L. 26; *Gaffney* v. *Illingsworth,* 90 N. J. L. 490, 493; *Robinson* v. *Payne,* 99 N. J. L. 135, 142; *Martin* v. *Lehigh Valley R. R. Co.,* 114 N. J. L. 243. It cannot be left to conjecture how the highest Court would have ruled.

The refusal to issue the Writ was not because of statutory prohibition, or judicial limitation, but to the fact that the arguments of appellants were so untenable that they failed to present a debatable question. Appellants now in effect contend that the State Court was arbitrary in so holding and thereby abused its discretion. This was a proper subject matter for review by the State's highest Appellate Court.

This Court has no power to review any other judgments of the Court of a State than those of the highest Court "in which a decision in the suit could be had." *Fisher* v. *Perkins,* 122 U. S. 522.

MOTION TO DISMISS, AND IN THE ALTERNATIVE, TO AFFIRM.

Now comes the Appellee, the Board of Education of the City of Paterson, in the County of Passaic, by John F. Evans, its Counsel, and moves this Court to dismiss, with costs, the Appeal for want of jurisdiction; and, in the alternative, said Appellee moves to affirm the judgment from which the Appeal in the above entitled cause purports to have been taken upon the following grounds:

1. The Federal question was not properly "raised" in the State Courts.

2. The State Court decision was not based on the determination of the Federal question.

3. The questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

4. The Appeal is not from a final judgment of the highest court of the State in which a decision could be had.

HAROLD D. GREEN,
SAUL R. ALEXANDER,
Counsel for Appellee.

JOHN F. EVANS,
Of Counsel With Appellee,
July 18, 1944.

APPENDIX A.

"The salary of a principal or teacher shall not be increased except on the recommendation of the Superintendent and the Committee on Education, and the increases in salary carried with License No. 6 shall become effective on the first of the month following the filing of evidence of the completion of all requirements entitling the teacher to such certificate." Adopted October 27, 1911.*

APPENDIX B.

18:13-5 Revised Statutes of New Jersey:

"Rules governing employment of teachers and principals. A board of education may make rules and regulations not inconsistent with the provisions of this title governing the engagement and employment of teachers and principals, the terms and tenure of employment, the promotion and dismissal of teachers and principals, and the salaries and the time and mode of payment thereof. A board may from time to time change, amend, or repeal such rules and regulations.

The employment of any teacher by a board, and the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the rules and regulations in force with reference thereto."

APPENDIX C.

18:13-16 Revised Statutes of New Jersey. (Formerly Chapter 243 P. L. 1909, Sec. 1:)

"The services of all teachers, principals and supervising principals of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency, after the expiration of a period of employment of three consecu-

* NOTE: This provision was incorporated in the Salary Schedule adopted October 13, 1921, and amended July 14, 1927.

tive calendar years in that district unless a shorter period is fixed by the employing board; or after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year; provided, that the time any teacher, principal or supervising principal had taught in the district in which he was employed on June fifth, one thousand nine hundred and thirty-four, shall be counted in determining such period of employment in that district.

An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

APPENDIX D.

18:13-17 Revised Statutes of New Jersey (Formerly Chapter 243 P. L. 1909, Sec. 1)

"No teacher, principal, or supervising principal under the tenure referred to in section 18:13-16 of this title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact by the board of education upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of the school board or not."

APPENDIX E.

Resolution of the Board of Education of the City of Paterson, in the County of Passaic, adopted Oct. 14, 1937.

"Resolved, that all resolutions heretofore adopted and approved by the Board of Education, providing

for a reduction in the basic salary of the officers and employees of the Board of Education be rescinded as of October 1, 1937, and be it further

Resolved, that on and after October 1, 1937, all officers and employees be paid the base salary in accordance with the terms of their employment, providing the aforesaid officers and employees waive all claims, demands, damages or liabilities, which they have had or now have for or on account of any and all reductions made or affected prior to said October 1, 1937."

(3220)

FILED
OCT 27 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 311.

CHARLES D. OFFHOUSE, *et al.*,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON IN THE COUNTY OF PASSAIC, a corporation,
Appellee.

PETITION FOR REHEARING.

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BOARD OF EDUCATION OF THE CITY OF PATERSON IN THE COUNTY OF PASSAIC, a corporation,
Appellee.

PETITION FOR REHEARING.

The appellants present this petition for a rehearing of this cause, and in support thereof, respectfully show:

I.

Phelps v. *Board of Education*, 300 U. S. 319, Is Not a Controlling Precedent.

The *per curiam* judgment of this Court, on October 9, 1944, dismissed this appeal for want of a substantial federal question, on the authority of *Phelps* v. *Board of Education*, 300 U. S. 319, at page 323.

That case determined that the Teachers' Tenure Act enacted in 1909 (Ch. 243, P. L. 1909; now R. S. 18:13-17) did not create a contract.

The claim of contract in this case is based upon a 1903 statute (Ch. 1, P. L. 1903, Second Special Session, § 106;

now R. S. 18:13-5 and R. S. 18:13-7). That statute, which is determinative of the issue here, was not in issue in the *Phelps* case.

The 1909 act, which was determinative of the *Phelps* case, is not the basis for the claim of contract in issue here.

The two statutes, the 1909 act and the 1903 act, exist independently of each other; they are distinct and separate statutes.

The 1903 act has never been construed by this Court.

In the *Phelps* case, no claim of constitutional right was made upon the basis of any statute other than the 1909 act, or upon any express contract entered into between the teachers and the school board. The appellants in that case contended (300 U. S. 319, at 322) that they had, by virtue of the 1909 act, a "contractual status indefinite in duration which the legislature is powerless to alter or to authorize the board of education to alter". No express contract between the parties was in evidence or in issue. The contrary was stipulated (300 U. S. 319, at 323).

In the case at bar, the claim is made (1) that the appellee was authorized by the legislature to contract with the appellants pursuant to the 1903 act; (2) that the appellee did so contract and performed its contract (as did the appellants) for more than 11 years; (3) that the appellee repealed that contract, in violation of Article 1, §10 of the Constitution. The appellants here do not claim a "contractual status indefinite in duration" by virtue of the 1909 act.

The appellants respectfully insist that their claim presents a question entirely different from that treated in the

Phelps case, and upon which they are entitled to invoke the judgment of this Court. An adjudication of rights under statute "A" (the 1909 act in the *Phelps* case) cannot determine rights under statute "B" (the 1903 act in this case). The appellants respectfully submit that the essential, vital differences between their claim and that treated in the *Phelps* case were overlooked by this Court, an oversight which is demonstrated by this Court's reference, in its *per curiam* judgment, to page 323 of the opinion in the *Phelps* case.

Two points are disclosed on that page of the opinion: (1) that there was no contract arising out of any act of the parties in that case; and (2) that the 1909 statute created no contract.

In the instant case, (1) there is a complete and express contract between the parties; (2) the appellants do not contend that the 1909 act created any contract; (3) the record not only discloses a continuing contract between the board and the teachers, but (4) it shows that the board hired and paid its teachers on the basis of that contract.

In 1941, more than four years after this Court affirmed the New Jersey Court of Errors and Appeals in its view that the appellants in the *Phelps* case had no "contractual status" under the 1909 act, that same court construed the 1903 act as authorizing a school board to make an effective contract with its teacher employees. See *Weber* v. *Board of Education of Trenton*, 127 N. J. L. 279, at 284, 285, 286. It was there held (at page 284) that "the power to make rules and regulations [under the 1903 act] with respect to teachers and their employment does not carry with it the right to abrogate definite salary contracts."

In this case, there is a definite salary contract, having the same form as the contract in the *Weber* case.

The decision of the New Jersey Court of Errors and Appeals in the *Weber* case was based directly upon the same statute here in issue, and followed by more than five years its decision in the *Phelps* case. It precludes any conclusion that a contract could not arise under the 1903 act by reason of anything this Court may have said in the *Phelps* case. The decision in the *Weber* case should receive the consideration of this Court.

The appellants believe that it is not this Court's intention to foreclose itself from a consideration of any constitutional question under any law of New Jersey which, on its surface, may appear to touch the particular statute or general subject matter reviewed in the *Phelps* case, and yet this is the implication of its decision dismissing this appeal on the authority of the *Phelps* case.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that the *per curiam* judgment of this Court, be, upon further consideration, vacated, so that this Court may hear this case upon its merits.

Respectfully submitted,

JEROME C. EISENBERG,
Counsel for Appellants.

Certificate of Counsel.

I, JEROME C. EISENBERG, counsel for the above named appellants, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JEROME C. EISENBERG,
Counsel for Appellants.

No. 311. OFFHOUSE ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF PATERSON. Appeal from the Supreme Court of New Jersey. October 9, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Phelps* v. *Board of Education*, 300 U. S. 319, 323. *Mr. Jerome C. Eisenberg* for appellants. *Mr. John F. Evans* for appellee. Reported below: 131 N. J. L. 391, 36 A. 2d 884.